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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 859

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–25a) is not yet officially reported. The tentative decision of the Federal Communications Commission (J.A. 681–721) [1] is reported, *sub nom. TELPAK,* at 38 F.C.C. 370; its final decision (J.A. 1116–31) is reported at 37 F.C.C. 1111; and its memorandum opinion and order denying reconsideration (J.A. 1173–87) is reported at 38 F.C.C. 761.

[1] "J.A." refers to the printed joint appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1966 (Pet. App. 26a), and the petition for a writ of certiorari was filed on December 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Communications Commission found that certain rates under a tariff for "Telpak" private line communications service offered by American Telephone and Telegraph Company create an unreasonable discrimination and are accordingly unlawful under Section 202(a) of the Federal Communications Act of 1934. The questions presented are:

1. Whether the Commission's ruling has a rational basis and is supported by substantial evidence.

2. Whether the Commission's reliance in the decisional process upon assistance from its Common Carrier Bureau, which participated in the proceedings through counsel, was a denial of due process of law.

STATUTES INVOLVED

Section 202(a) of the Communications Act of 1934, 48 Stat. 1070, as amended (47 U.S.C. 202(a)), provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular per-

son, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Other pertinent portions of the Communications Act of 1934 and pertinent portions of the Administrative Procedure Act, 60 Stat. 237 (5 U.S.C. 1001–1011), are set forth in the petition (Pet. App. 26a–33a).

STATEMENT

This case involves rates under a tariff of the American Telephone & Telegraph Company (AT&T), offering a private line communications service known as "Telpak," which the Federal Communications Commission found to be unlawfully discriminatory.

Wire and radio communications channels of a given band width may be divided by appropriate equipment into narrower channels to serve various communications needs—ranging from four kilocycles (kc) for voice grade transmission, to 1000 kc for certain forms of data transmission. Private line service[2] may be offered over such channels by communications carriers to both small and large users. In 1960 the Commission allocated certain frequencies for the use of private industry, thus making it possible for large users to establish their own communications system. Allegedly to meet this potential competition, AT&T filed its Telpak tariff on January 16, 1961 (J.A. 1187–

[2] Private line service consists of the leasing of communications channels for transmissions between specified locations without requiring the carriers to establish connections for each call or message. It includes telephone, telegraph, telephoto, data transmission, remote metering, miscellaneous signalling and multiple channel service.

1190; 1308–1328; see Pet. App. 8a). The tariff tendered the subscriber four categories of broadband Telpak channels. Telpak A offered the equivalent of 12 voice grade channels; Telpak B, 24; Telpak C, 60; Telpak D, 240.[3] In addition, AT&T offered to provide the equipment necessary to divide these channels into channels of lesser band width.

Shortly after this initial tariff had been filed, however, Western Union complained to the Commission that AT&T did not in fact propose to furnish a discrete[4] broadband channel which would be subdivided to the customer's specifications, as the tariff seemed to provide, but rather a group of conventional private line channels over diverse facilities at volume discounts ranging from approximately 50 percent (under Telpak A) to 85 percent (under Telpak D) (J.A. 1198–1212). After consideration of the complaint, the Commission agreed (J.A. 1225–1231; 1247–1254).

AT&T then amended its tariff to provide for the furnishing of Telpak "derived channels" by diverse facilities (J.A. 1253–1254). Motorola, Inc., an equipment manufacturer, and Western Union protested

[3] The tariff described the offering as (J.A. 1188):

"* * * communications paths of various widths (TELPAK (Channels) which are capable of transmitting various forms of electrical communication required by a modern business, such as telephone, teletypewriter, control, signalling, facsimile and data. The Telephone Company will provide channelizing equipment to sub-divide TELPAK channels into channels of lesser width (derived channels) or will terminate the entire TELPAK channel for use as a broadband transmission medium."

[4] Discrete channels are those provided in a single broadband on the same physical facilities. Diverse channels are those furnished over such physical facilities as the carrier elects.

that the revised tariff was discriminatory because it was nothing more than an offering of private lines on a volume discount basis without cost or other justification (J.A. 1256–1293). In September 1961 the Commission suspended the operation of the tariff [5] and ordered an investigation, in which its Common Carrier Bureau participated through counsel. An examiner took evidence in some 36 days of hearings and then certified the record to the full Commission without an initial or recommended decision.

In a tentative decision issued in March 1964 the Commission held that the rates for Telpak A and B were unlawfully discriminatory (J.A. 681–721). It found that:

> (a) Services furnished under the TELPAK tariff and those furnished under the various other private line tariffs are like communications services.
>
> (b) There are no material cost differences attributable to furnishing a number of channels to one customer under TELPAK as opposed to furnishing the same number of channels to several customers under the other private line tariffs.
>
> (c) There is no justification for TELPAK A and TELPAK B in terms of competitive necessity, inasmuch as the rates for the equivalent number of channels offered under ordinary private line tariffs are reasonably competitive with the costs of private microwave systems.
>
> (d) There is apparent justification for TELPAK C and D classifications in terms of meet-

[5] The amended tariff went into effect automatically upon the expiration of the three months' statutory period, subsequent to suspension, pursuant to 47 U.S.C. 204.

> ing competition from private microwave systems having channel capacities comparable to those offered by such TELPAK classifications. However, we are unable to determine on this record that the rates for TELPAK C and D classifications are compensatory in relation to the costs of furnishing the services offered thereunder and, therefore, are unable to find that the other users of A.T.&T. services will benefit and not be burdened by the application of such rates [J.A. 718].

The Commission noted that its decision did not foreclose carriers from establishing schedules of charges which would promote the use of volume communciations or stimulate the growth of the communications market generally, but indicated that whether the purpose was to meet competition or to attract new business, such schedules should benefit rather than burden other users of the carrier's services, and should not result in unjust or unreasonable discrimination (J.A. 718–719).

After taking exceptions and hearing oral argument *en banc,* the Commission in December 1964 issued a memorandum opinion and order substantially adopting the findings and conclusions of the tentative decision (J.A. 1116–1131). Petitions for reconsideration were thereafter denied (J.A. 1172–1187). In preparing its tentative and final decisions, the Commission utilized the services of staff members from the Common Carrier Bureau who had appeared as counsel of record in the proceedings.

AT&T and various customers of Telpak filed petitions for review in the court of appeals. On September 15, 1966, the court below entered its judgment

affirming the orders of the Commission (Pet. App. 1a–25a). After a detailed analysis of the pertinent statutory provisions and a thorough consideration of the record, the court below concluded that the decision was supported by substantial evidence and that no basis had been shown for disturbing it.[6]

ARGUMENT

1. Petitioners are customers of AT&T who are in a position to take advantage of the Telpak A and B volume discount rates.[7] But they do not challenge the Commission's findings that Telpak and other private line tariffs offer "like communications services";[8] that no material cost differences result from offering such services on a volume basis; and that Telpak A and B discounts are not justified by competitive necessity (J.A. 718). Rather, they urge that the Commis-

[6] While both AT&T and the United States (the largest Telpak customer), acting through the General Services Administration, challenged the Commission's orders in the court of appeals, neither party seeks further review in this Court. It is the position of the United States in this Court that, despite the potential financial effect of the Commission's determination on the government as the principal user of Telpak, the Commission's decision was properly upheld by the court below, and that no further review is warranted. Accordingly, the United States joins with the Commission in opposing certiorari.

[7] No question as to the legality of Telpak C and D rates was before the court of appeals (Pet. App. 14a). Most of the service used by the government is under Telpak C and D, not A and B.

[8] Whatever petitioners seek to gain from describing Telpak as "developmental" (*e.g.*, Pet. 2, 3) is substantially undermined by this unchallenged finding. In addition, the Commission concluded that Telpak A and B and private line services are furnished under substantially similar circumstances and conditions (J.A. 698, 717).

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sion has applied too narrow a standard in finding unreasonable discrimination under Section 202(a) of the Communications Act.

It is, however, well established under Section 2 of the Interstate Commerce Act (from which Section 202(a) was derived) [9] that the reasonableness of a discrimination is basically a factual question which has been committed by Congress to the expert judgment of the agency. See, *e.g., L. T. Barringer & Co.* v. *United States,* 319 U.S. 1, 6, 7. An administrative agency's conclusion on such a question will be disturbed only if it is not supported by substantial evidence, lacks a rational basis, or rests on an erroneous construction of the statute. After a comprehensive review of the record, the court below found that there was substantial evidence to support the Commission's ruling, that its decision had a rational basis, and that it properly applied the criteria of the Communications Act. There is thus no occasion for further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

Nor is there a basis for petitioner's contention, (Pet. 11–13), not presented below, that the Commission erred in failing to create a special "large commercial" user classification for them under Section 201(b) of the Act (47 U.S.C. 201(b)).[10] This section

[9] S. Rep. No. 781, 73rd Cong., 2d Sess., p. 304; H. Rep. No. 1850, 73rd Cong., 2d Sess., p. 5.

[10] In pertinent part, Section 201(b) provides:

"All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio sub-

empowers the Commission to make reasonable classifications of communication services, including a "commercial" classification. But there is nothing to indicate that the term "commercial" in Section 201(b) can properly be regarded as synonymous with the concept of "large volume users" of communication service. Petitioners actually seek a subclassification of the "commercial" classification, or the creation of a new classification (which the Commission in its discretion has authority to do under Section 201(b)), narrowly tailored to Telpak. That the Commission did not abuse its discretion in refusing to do so is plain, and does not warrant further comment. Moreover, in the Commission proceeding the primary question was whether Telpak could be justified as a distinct classification based on volume. In resolving that question, the Commission found Telpak A and B to be substantially the same as ordinary private line service and to be unjustifiable on the basis of cost or competitive necessity—the only justifications advanced by the parties before the Commission. Since the court below found substantial support for the Commission's resolution of these questions of fact and policy, no further consideration is necessary.

Contrary to petitioners' assertion (Pet. 15), the Communications Act does not require that the Commission find actual injury to other users of the service involved before it can conclude that a rate is un-

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ject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications * * *."

reasonably discriminatory. The purpose of Section 202(a) is to assure equality of treatment among users of like services. Only in special circumstances may a departure from this policy be justified. Thus, Section 202(a) does not require a finding of actual injury in the face of unequal treatment, but rather a showing by the proponent of a discriminatory rate that it is justified (see Pet. App. 22a–23a). Cf. *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344; *Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U.S. 263, 281–282.

In reaching its result, the Commission followed the policy guidelines which Congress had laid down in Section 1 of the Act (47 U.S.C. 151). Its decision does not inhibit the expanded use of nationwide telecommunications systems, for Telpak encompasses no service that is not presently available either at reasonable rates under regular private line service tariffs, or through privately owned microwave systems. Even if the question of communications policy involved in this case were open to judicial consideration, the Commission's ruling is sound. It encourages competition in telecommunications, protects non-Telpak customers from carrying an unreasonable burden, and encourages further development of private line service—both by communications carriers and by industry-owned systems.[11]

[11] The Commission found a substantial diversion of revenue from Western Union, and that Telpak "may well have effectively inhibited the establishment of private microwave systems" (J.A. 718).

No showing was made to the Commission that AT&T's discriminatory rates for Telpak A and B could be cost-justified (see Pet. App. 13a).[12] Indeed, since the additional equipment required for Telpak is included in AT&T's rate base, costs not recovered by its volume discount rates must be borne by AT&T's customers paying for other classes of service. Thus, on this record, petitioners would benefit from favorable rates and AT&T would enjoy an expanded rate base, while non-Telpak customers would subsidize a service which was of no benefit to them—and have in fact done so during the period when the tariff was in effect. Moreover, to the extent that Telpak rates are below actual costs (including return on investment), favorable rates to Telpak users may cause a misallocation of resources by encouraging them to

[12] On September 1, 1965, AT&T presented the results of its cost study in another investigation then underway before the Commission. The AT&T study concluded that the ratio of net operating earnings to net investment (rate of return) for Telpak was three-tenths of one percent. Although the Commission found it unnecessary in the present proceeding to determine whether Telpak rates covered full costs, AT&T's own study indicates quite clearly that they do not. On the basis of the data contained in this cost study, which showed wide variations in earnings levels for different classes of service, the Commission initiated a full-scale investigation into the lawfulness of AT&T's "rate levels and rate relationships within that structure" (*In re American Telephone & Telegraph Co.*, 2 F.C.C. 2d 871, 871–872), excepting, however, Telpak service, "as to which separate proceedings are now pending * * *" (*id.* at 874). After the court below denied petitioners' motion to stay its judgment, the Commission redirected AT&T to eliminate the unlawful discrimination between Telpak A and B and private line rates. It also ordered Telpak C and D placed in the full-scale investigation presently in progress. On January 9, 1967, AT&T filed a new unified Telpak A and B and private line tariff to become effective on May 1, 1967.

use Telpak instead of lower cost systems. If Telpak cannot compete at non-discriminatory prices with private microwave systems, then the latter, as the lower cost service, should be allowed to replace it.

That the Commission may permit volume discounts justified by competitive necessity for Telpak C and D (J.A. 718) is not, as petitioners contend (Pet. 15–16), inconsistent with its invalidation of the Telpak A and B rates. The Commission has simply recognized that competitive necessity may, under appropriate circumstances, warrant resort to volume discount rates, provided the rates (1) "cover the costs attributable to the business retained or obtained" so as not to burden other rate-payers, and (2) make some contribution to the overall economy of the business (*i.e.*, by reducing fixed costs) (J.A. 1122–1123). As to Telpak A and B, however, competitive necessity was not adequately proved; as to Telpak C and D, whether the volume rates are properly compensatory was left undecided by the Commission, pending further hearings (see Pet. App. 14a).

Finally, petitioners err in contending that the only effect of the Commission's order will be to bestow a benefit on AT&T in the form of increased Telpak revenues. Such increases as are allowed will simply offset the costs borne by other regulated services provided by AT&T which would otherwise subsidize—and have heretofore subsidized—Telpak. Moreover, if petitioners believe that the increased rates are unreasonably high, they may apply to the Commission for appropriate relief, under 47 U.S.C. 204, 208.

2. Petitioners contend (Pet. 20–32) that participation in the decisional process by members of the Com-

mission's Common Carrier Bureau who also appeared as counsel of record in the hearings deprived them of a fair hearing in violation of the Due Process Clause of the Fifth Amendment. But in *Wilson & Co.* v. *United States*, 335 F. 2d 788 (C.A. 7), certiorari denied, 380 U.S. 951, which involved a general investigation of all private line tariffs, the Commission followed the same procedure, directed its Examiner not to prepare a decision, issued a tentative decision itself, received exceptions and then issued a final decision, all with the participation of the Common Carrier Bureau. The procedure was held to be consistent with the Administrative Procedure Act, the hearing provisions of the Communications Act (47 U.S.C. 205(a), 409(c)), the Commission's own rules and due process of law. There are no decisions to the contrary.[13]

Petitioners recognize (Pet. 29) that Section 5(c) of the Administrative Procedure Act does not require staff separation of functions in "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers * * *" (5 U.S.C. 1004(c)), and that "rule making" is defined in Section 2(c) to include "the approval or prescription for the future of rates" (5 U.S.C. 1001 (c)).[14] And

[13] While declining to review this holding, the Court granted certiorari to review other rulings of the Seventh Circuit relating to the same proceeding. See *United States* v. *Wilson & Co.*, 380 U.S. 950, remanded, 382 U.S. 454.

[14] This Court has consistently treated ratemaking as constituting rulemaking, rather than adjudication. See, *e.g.*, *United States* v. *Morgan*, 313 U.S. 409; *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370; *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R. Co.*, 233 U.S. 479. In the Administrative Procedure Act and the Communications Act, Congress followed that basic dichotomy; the provisions of

their reliance on *Morgan* v. *United States*, 304 U.S. 1 (Pet. 22–23) is misplaced.

In *Morgan* the Court reversed a rate order of the Secretary of Agriculture because the interested parties were not given "a reasonable opportunity to know the claims of the opposing party [the Secretary] and to meet them" (304 U.S. at 18). The Secretary had never clarified his position during the hearings (*id.* at 19), and the first notice the parties received of his "concrete claims" was after the Secretary had finally "accept[ed] and ma[de] as his own the findings which ha[d] been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (*id.* at 22).

Morgan did not hold the preparation of a decision by counsel who had participated in the hearings was *per se* improper. In fact, following the remand the Secretary of Agriculture reissued his original final decision as an initial or tentative decision, giving the parties an opportunity to file exceptions and to present oral argument on the exceptions, a procedure approved by this Court in *United States* v. *Morgan*, 307 U.S. 183, 187, and again in *United States* v. *Morgan*,

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those Acts relating to staff separation of functions (5 U.S.C. 1004(c); 47 U.S.C. 409(c)) apply only to cases of adjudication. Adjudicatory cases are primarily "concerned with the determination of past and present rights and liabilities," and are thus "characterized by an accusatory flavor," while, on the other hand, rulemaking proceedings are "essentially legislative in nature." *Attorney General's Manual on the Administrative Procedure Act*, 14 (1947).

313 U.S. 409, 415–416 (after the taking of new evidence, since several years had passed since the Secretary's first decision).

In the present case, the Commission issued an elaborate tentative decision (J.A. 681–721).[15] Petitioners filed exceptions with supporting briefs and participated in oral argument before the Commission—all prior to the adoption of a final decision. They were thus afforded a fair opportunity to know and meet the Commission's contentions, which is all that the *Morgan* cases and the Due Process Clause require. See *Willapoint Oysters, Inc.* v. *Ewing,* 174 F. 2d 676, 692–94 (C.A. 9), certiorari denied, 338 U.S. 860.[16] Review by this Court is thus not warranted.

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[15] While petitioners claim that the omission of an initial decision by the examiner was arbitrary (Pet. 20, 25), they fail to recognize that Section 8(a) of the Administrative Procedure Act (5 U.S.C. 1007(a)) provides that: "* * * Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision *except that in rule making* or determining applications for initial licenses (1) *in lieu thereof the agency may issue a tentative decision* or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires" (emphasis added). While petitioners also assert that the Examiner deferred to Bureau counsel on all important rulings on evidence (Pet. 20–21), they point to no ruling which they specifically consider improper.

[16] While it might be deemed wise for Congress to subject ratemaking, at least under certain circumstances, to the separation of functions provisions of the Administrative Procedure Act (Pet. 30–32), this is clearly a matter of legislative judgment. Indeed, in the 89th Congress the Senate passed a bill which would provide for the separation of functions petitioners seek. S. 1336, 89th Cong., 2d Sess., §§ 2(c), (d); see S. Rep. No. 1234, 89th Cong., 2d Sess., p. 9.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967